

FOR PUBLICATION

**UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT**

BRITTANY K. MACDONALD,

Plaintiff - Appellant,

v.

OREGON HEALTH AND
SCIENCE UNIVERSITY, A Public
Corporation and Governmental
Entity; WAYNE MONFRIES, An
Individual; RUTH BEYER, An
Individual; MAHTAB BRAR, An
Individual; JAMES A. CARLSON,
An Individual; DANNY JACOBS,
An Individual; SUSAN KING, An
Individual; CHAD PAULSON, An
Individual; SUE STEWARD, An
Individual; STEVE ZIKA, An
Individual; DOES, 1-50, inclusive,

Defendants - Appellees.

No. 24-4852

D.C. No.
3:22-cv-01942-IM

OPINION

Appeal from the United States District Court
for the District of Oregon
Karin J. Immergut, District Judge, Presiding

Argued and Submitted June 9, 2026
Seattle, Washington

Filed October 2, 2026

Before: Michael Daly Hawkins and Eric C. Tung, Circuit
Judges, and Kiyo A. Matsumoto, District Judge.*

Opinion by Judge Matsumoto;
Dissent by Judge Tung

SUMMARY**

COVID-19 Vaccination Policy / Free Exercise / Title VII

The panel affirmed (1) the district court’s dismissal, on qualified immunity grounds, of Brittany K. MacDonald’s Free Exercise claim; and (2) the district court’s summary judgment for Oregon Health and Science University (“OHSU”) on MacDonald’s Title VII failure to accommodate claim, in her action challenging the denial of her request for a religious exemption from a COVID-19 vaccination policy.

Pursuant to Executive Order No. 21-29 issued by Oregon Governor Kate Brown, which required all healthcare workers in Oregon’s healthcare facilities to be vaccinated

* The Honorable Kiyo A. Matsumoto, United States District Judge for the Eastern District of New York, sitting by designation.

** This summary constitutes no part of the opinion of the court. It has been prepared by court staff for the convenience of the reader.

against COVID-19, OHSU required all OHSU personnel to be vaccinated by October 18, 2021, unless an individual received an approved religious or medical exemption. An email notice sent to employees who had requested an exemption provided examples of beliefs that do not qualify for a religious exemption, including “[a]n objection to the vaccine on the basis of fetal cell concerns, either in the vaccines or in testing and development.”

MacDonald, who was a registered nurse at Doernbecher Children’s Hospital of OHSU, requested a religious exemption, asserting, in part, that her “beliefs regarding the sanctity of life conflict directly with any requirement to inject abortion derived cell lines into [her] body.” After her exemption request was denied, and she was terminated for failing to be vaccinated, MacDonald filed suit alleging (1) a 42 U.S.C. § 1983 Free Exercise claim against individuals who served on the OHSU Board of Directors and members of OHSU’s Vaccine Exception Review Committee (collectively, the “Individual Defendants”); and (2) a 42 U.S.C. § 2000e-2(a)(1) Title VII failure to accommodate her religious beliefs claim against OHSU.

The panel held that the Individual Defendants were entitled to qualified immunity on MacDonald’s Free Exercise claim because the right to refuse a state-mandated vaccine by a healthcare worker who works in-person with vulnerable populations due to allegedly religious concerns about fetal cells and bodily integrity or sanctity was not clearly established at the time the Individual Defendants denied MacDonald’s religious exemption.

The panel next affirmed the district court’s summary judgment for OHSU on MacDonald’s Title VII failure to accommodate claim because OHSU demonstrated that it

could not have accommodated Macdonald without undue hardship. OHSU's evidence established that the health and safety risks posed to OHSU's patients and employees presented a substantial hardship in the context of its business, and accommodating MacDonald would have imposed substantial operational and financial costs on OHSU.

Addressing MacDonald's pretext arguments, the panel wrote that there is no precedent that imports a "pretext" or "discriminatory motives" analysis into the "undue hardship" failure to accommodate analysis. And even if pretext were a part of the analysis, MacDonald failed to present a triable issue of material fact establishing that OHSU's demonstrated substantial economic and noneconomic costs in allowing MacDonald to work while unvaccinated were mere pretext.

Dissenting, Judge Tung wrote that the defendants' conduct here plainly violated established law prohibiting the targeting of a person's religious beliefs. The policy singled out an employee's religious objection to abortion and the use of fetal tissue as categorically undeserving of any consideration, which is a classic case of the State targeting religious beliefs and is never permissible. Because MacDonald had a right to be free from the State's targeting of her religious belief (against the use of aborted fetal cells) by deeming such a belief not "religious" at all and thus not worthy of consideration for an exemption, the Defendants should have been denied qualified immunity.

COUNSEL

Ray D. Hacke (argued), Pacific Justice Institute, Salem, Oregon; Matthew B. McReynolds, Pacific Justice Institute, Sacramento, California; for Plaintiff-Appellant.

Whitney A. Brown (argued), Stoel Rives LLP, Anchorage, Alaska; Alex Van Rysselberghe, Thomas R. Johnson, Rachelle Collins, and Brenda K. Baumgart, Stoel Rives LLP, Portland, Oregon; for Defendants-Appellees.

OPINION

MATSUMOTO, United States District Judge for the Eastern District of New York, sitting by designation:

We must decide (i) whether it was clearly established as of 2021 that the denial of a mandatory COVID-19 vaccine exemption request based on “fetal cell” and “bodily integrity and sanctity” concerns violates the Free Exercise Clause of the First Amendment such that qualified immunity does not apply to individual officers of Oregon Health and Science University (“OHSU”); and (ii) whether Defendant OHSU demonstrated that it could not have provided a COVID-19 vaccine exemption accommodation to a registered nurse in the Mother Baby Unit (“MBU”) of the Doernbecher Children’s Hospital of OHSU without undue hardship. We affirm the district court’s decision that (i) qualified immunity applies to Plaintiff’s Free Exercise claim; and (ii) OHSU was entitled to summary judgment on Plaintiff’s Title VII failure to accommodate claim because OHSU

demonstrated it could not accommodate Plaintiff without undue hardship.

BACKGROUND

In the fall of 2021, Plaintiff-Appellant Brittany K. MacDonald (“MacDonald”) was a registered nurse in the MBU of the Doernbecher Children’s Hospital of OHSU who had worked there since October 8, 2012. The MBU provides intensive care to pregnant mothers, newborns and immunocompromised patients with critical conditions, including cancer. MBU registered nurses must be in direct physical contact with, or close proximity to, their patients because MBU registered nurses provide direct care such as feeding, bathing, diapering, administering medications, responding to emergencies, and assisting mothers with holding and breastfeeding their babies. MacDonald is a practicing Christian who opposes abortion. OHSU had previously accommodated MacDonald’s religious preference to not participate in performing abortions.

OHSU is Oregon’s largest public hospital system and only public academic health institution. In 2021, OHSU employed approximately 20,000 employees and cared for approximately 330,000 patients. The Oregon State legislature created OHSU and charged OHSU with “serv[ing] the people of the State of Oregon” and delivering health care “in the manner that . . . best promotes the public welfare of the people of the State of Oregon.” Or. Rev. Stat. § 353.030(1), (4).

COVID-19 is a disease caused by the SARS-CoV-2 virus and was declared a global pandemic in March 2020. SARS-CoV-2 evolved and mutated into different variants including the highly transmissible Delta variant in the summer of 2021. The Delta variant was more contagious than prior variants,

involved a significantly higher risk of severe disease and hospitalization, and surged between June and September 2021—at its peak, the Delta variant claimed 1,500 American lives per day. The risk of Delta transmission was especially high in hospitals where social distancing between healthcare workers and patients was often not possible. The Centers for Disease Control and Prevention, World Health Organization, Food and Drug Administration and Centers for Medicare & Medicaid Services recommended vaccines as the best way to protect against COVID-19.

In response to the deadly Delta variant in August 2021, Oregon Governor Kate Brown issued Executive Order No. 21-29, which required all healthcare workers in Oregon’s healthcare facilities to be vaccinated against COVID-19 by October 18, 2021, and prohibited OHSU from allowing any unvaccinated healthcare employee to continue to work for OHSU after October 18, 2021 (the “Vaccine Mandate”). *See* Or. Admin. R. 333-019-1010 (2021). To comply, OHSU required all OHSU personnel to be vaccinated by October 18, 2021, unless an individual received an approved religious or medical exemption. The Vaccine Exception Review Committee (the “Review Committee”) reviewed and decided all requests for religious exemptions.

On September 19, 2021, MacDonald submitted a religious exemption request to OHSU and attached a five-page document with her responses to the request form’s three questions. MacDonald asserted that her “body was the temple of the Holy Spirit” and her “beliefs regarding the sanctity of life conflict directly with any requirement to inject abortion derived cell lines into [her] body.” She also asserted that she was “moved by the Holy Spirit to reject the vaccine repeatedly” and received “divine guidance” from God to reject the COVID-19 vaccine.

On September 30, 2021, OHSU sent an email notice to employees and supervisors of employees who had requested an exemption. The email notice stated that “each review” required “a high level of individual assessment by multiple reviewers.” The email also “shar[ed] further detail on OHSU’s narrow criteria for exemption approvals,” which “ha[d] been set to help OHSU keep [its] members and those [it] served safe” to help guide decision-making because OHSU “expect[ed] very few of the submitted requests for religious exemptions to be approved.” The email notice provided notice of “[e]xamples of beliefs that do not qualify for a religious exemption” including:

Concerns over vaccine safety or content.

- These are not religious arguments and often inconsistent with proven facts.

An objection to the vaccine on the basis of fetal cell concerns, either in the vaccines or in testing and development.

- These professed beliefs are personal moral choices and/or conscientious objections rather than a tenet of a religious faith.
- No fetal tissue or cells are contained in any of the vaccines currently available under FDA approval or emergency use authorization in the U.S.
- While they played no role in their development or production, HEK-293 cell lines created over 50 years ago were used in confirmatory testing of the current mRNA vaccines. Cells from the same line have commonly been used in

biologic research since the late 70s. This cell line is used in the testing of many common medicines, including Tylenol, Advil, Aspirin, Claritin, Benadryl, Pepto-Bismol, Mucinex, Turns and Prilosec, among many others.

A personal revelation from God about the vaccine, an objection to the vaccine based upon bodily integrity or sanctity, and/or a belief that the vaccine is “unclean.”

- These are personal moral choices and/or conscientious objection rather than a tenet of a religious faith.

A vaccine exemption would be provided to those who “demonstrate[d] a sincerely held religious belief and past behavior consistent with that belief.”

On October 7, 2021, OHSU sent MacDonald an email informing MacDonald that the Review Committee had denied MacDonald’s request for a religious exemption. This email did not provide individualized reasons for denying MacDonald’s request but stated that the “vast majority” of “denials were because the requestor did not meet the legal requirements for a religious exemption but instead stated personal beliefs or conscientious objections as opposed to a fundamental tenet of a religious faith.” The Committee again provided examples of beliefs that did not qualify for religious exemption including: “concerns over vaccine safety or content,” “an objection to the vaccine on the basis of fetal cell concerns,” a “personal revelation from God about the vaccine,” and “an objection to the COVID vaccine based upon bodily integrity or sanctity and/or a belief that the vaccine is ‘unclean.’” OHSU’s October 7, 2021 email

informed MacDonald that if she was not vaccinated against COVID-19 by October 18, 2021, she could not “continue to work” at OHSU. MacDonald failed to be vaccinated against COVID-19 and was terminated on December 2, 2021.

On December 15, 2022, MacDonald filed her complaint in the district court alleging two causes of action: (1) a 42 U.S.C. § 1983 Free Exercise claim against: (a) individuals who served on the OHSU Board of Directors (the “Board Defendants”) who allegedly established OHSU’s policies and protocols regarding religious exemptions from the Vaccine Mandate, and (b) members of OHSU’s Vaccine Exception Review Committee (“VERC Defendants,” together with the Board Defendants, the “Individual Defendants”) who allegedly reviewed and evaluated medical and religious exemption requests, (the “Free Exercise Claim”); and (2) a 42 U.S.C. § 2000e-2(a)(1) Title VII failure to accommodate her religious beliefs claim against OHSU.

On August 28, 2023, the district court granted the Individual Defendants’ motion to dismiss MacDonald’s Free Exercise Claim and request for declaratory relief with prejudice but denied OHSU’s motion to dismiss MacDonald’s Title VII claims. The district court held that the Individual Defendants were entitled to qualified immunity on MacDonald’s Free Exercise Claim because “the right to refuse a state-mandated vaccine by a healthcare worker who works in-person with vulnerable populations due to allegedly religious concerns about ‘fetal cells’ and ‘bodily integrity or sanctity’ was not clearly established at the time the Individual Defendants denied Plaintiff’s religious exemption.” The district court denied and dismissed Plaintiff’s request for declaratory relief as retrospective and barred by the Eleventh Amendment.

The district court subsequently granted OHSU’s motion for summary judgment on MacDonald’s Title VII claim. The district court granted summary judgment because OHSU demonstrated that if it had accommodated MacDonald, OHSU would have suffered “undue hardship” through “substantial increased cost[s]” and the risk of losing personnel and patients to illness.

STANDARD OF REVIEW

We review a district court’s grant of a motion to dismiss and issues of qualified immunity *de novo*. *Keates v. Koile*, 883 F.3d 1228, 1234 (9th Cir. 2018) (citation modified). “[W]e consider whether the complaint alleges sufficient facts, taken as true, to support the claim that the officials’ conduct violated clearly established constitutional rights of which a reasonable officer would be aware ‘in light of the specific context of the case.’” *Id.* at 1235 (quoting *Mullenix v. Luna*, 577 U.S. 7, 12 (2015)).

We review the district court’s summary judgment decision “*de novo*, viewing the evidence and drawing all reasonable inferences in the light most favorable to the non-moving party.” *Petersen v. Snohomish Reg’l Fire & Rescue*, 150 F.4th 1211, 1215 (9th Cir. 2025) (citation modified). The central issue is “whether the evidence presents a sufficient disagreement to require submission to a jury or whether it is so one-sided that one party must prevail as a matter of law.” *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 251–52 (1986).

DISCUSSION

I. MacDonald's Free Exercise Claim and Qualified Immunity

A. The Qualified Immunity Legal Framework

“Qualified immunity attaches when an official’s conduct ‘does not violate clearly established statutory or constitutional rights of which a reasonable person would have known.’” *White v. Pauly*, 580 U.S. 73, 78–79 (2017) (quoting *Mullenix*, 577 U.S. at 11). Qualified immunity protects “‘all but the plainly incompetent or those who knowingly violate the law.’” *White*, 580 U.S. at 79 (quoting *Mullenix*, 577 U.S. at 12). Although “a case directly on point” is not required, “existing precedent must have placed the statutory or constitutional question beyond debate.” *Ashcroft v. al-Kidd*, 563 U.S. 731, 741 (2011) (citation modified). “The relevant, dispositive inquiry . . . is whether it would be clear to a reasonable officer that his conduct was unlawful in the situation he confronted.” *Saucier v. Katz*, 533 U.S. 194, 202 (2001) (citation omitted), *overruled in part on other grounds by Pearson v. Callahan*, 555 U.S. 223 (2009).

In evaluating a grant of qualified immunity, courts consider whether the alleged government conduct violated (1) a constitutional right, and (2) “clearly established law” such that a reasonable officer would be on notice that such alleged misconduct was unlawful. *Pearson*, 555 U.S. at 232, 244 (citing *Saucier*, 533 U.S. at 201). After *Pearson*, we are no longer required to first engage in an analysis of whether the facts in a complaint alleged a constitutional violation because “[t]he procedure sometimes results in a substantial expenditure of scarce judicial resources on difficult questions that have no effect on the outcome of the case,”

and “[t]here are cases in which it is plain that a constitutional right is not clearly established but far from obvious whether in fact there is such a right.” 555 U.S. at 236–37. In other words, “[e]ither question may be addressed first, and if the answer to either is ‘no,’ then the state actor cannot be held liable for damages.” *Gordon v. County of Orange*, 6 F.4th 961, 968 (9th Cir. 2021) (citing *Pearson*, 555 U.S. at 236).

We affirm the district court’s finding that qualified immunity applies to MacDonald’s Free Exercise Claim because “the right to refuse a state-mandated vaccine by a healthcare worker who works in-person with vulnerable populations due to allegedly religious concerns about ‘fetal cells’ and ‘bodily integrity or sanctity’ was not clearly established at the time the Individual Defendants denied Plaintiff’s religious exemption.” Because our holding on the “clearly established” qualified immunity prong is dispositive in favor of the Individual Defendants’ qualified immunity defense, we need not consider whether the alleged government misconduct violated a constitutional right under the general rule of constitutional avoidance. *See Pearson*, 555 U.S. at 236, 241 (holding that courts no longer were required to address as the “initial inquiry” whether an “officer’s conduct violated a constitutional right” before deciding whether the right at issue was clearly established because, amongst other reasons, requiring courts to decide on the constitutional question first “departs from the general rule of constitutional avoidance”).

B. There Was No Clearly Established Law in 2021 that Provided Fair Notice to the Individual Defendants that Their Actions Violated the Free Exercise Clause

i. The “Clearly Established” Legal Standard

The “clearly established” inquiry turns on the “objective legal reasonableness of the [government] action, assessed in light of the legal rules that were clearly established at the time it was taken.” *Pearson*, 555 U.S. at 244 (citation modified). “A Government official’s conduct violates clearly established law when, at the time of the challenged conduct, ‘[t]he contours of [a] right [are] sufficiently clear’ [such] that every ‘reasonable official would [have understood] that what he is doing violates that right.’” *Ashcroft*, 563 U.S. at 741 (quoting *Anderson v. Creighton*, 483 U.S. 635, 640 (1987)). The “dispositive inquiry” is “whether it would be clear to a reasonable officer that his conduct was unlawful in the situation he confronted.” *Saucier*, 533 U.S. at 202 (citing *Wilson v. Layne*, 526 U.S. 603, 615 (1999)).

The Supreme Court has thus continued to “reiterate the longstanding principle that ‘clearly established law’ should not be defined ‘at a high level of generality.’” *White*, 580 U.S. at 79 (quoting *Ashcroft*, 563 U.S. at 742). We consider whether the alleged facts “support the claim that the officials’ conduct violated clearly established constitutional rights of which a reasonable officer would be aware, ‘in light of the specific context of the case, . . . not as a broad general proposition.’” *Keates v. Koile*, 883 F.3d 1228, 1235, 1239 (9th Cir. 2018) (quoting *Mullenix*, 577 U.S. at 12). “Otherwise, ‘[p]laintiffs would be able to convert the rule of qualified immunity . . . into a rule of virtually unqualified

liability simply by alleging violation of extremely abstract rights.” *White*, 580 U.S. at 79 (quoting *Anderson*, 483 U.S. at 639).

That we look to “the specific context” of MacDonald’s allegations under the “clearly established” prong, *Mullenix*, 577 U.S. at 12, comports with the Supreme Court’s Free Exercise framework. The Free Exercise Clause of the First Amendment protects free exercise of religion from government interference, see *Cantwell v. Connecticut*, 310 U.S. 296, 303–04 (1940), but any “burden” on “religious exercise” does not “presumptively violate” the Free Exercise Clause. *Youth 71Five Ministries v. Williams*, 160 F.4th 964, 978 (9th Cir. 2025). “Under [Supreme Court] precedents, the government is generally free to place incidental burdens on religious exercise so long as [the government] does so pursuant to a neutral policy that is generally applicable,” and the government action is rationally related to a legitimate government interest. *Mahmoud v. Taylor*, 606 U.S. 522, 564 (2025) (citing *Emp. Div., Dep’t of Human Res. v. Smith*, 494 U.S. 872, 878–79 (1990)). Conversely, if a government action is not neutral or generally applicable, it triggers “strict scrutiny,” which requires that the government action be “justified by a compelling state interest” and “narrowly tailored in pursuit of that interest” to avoid a Free Exercise violation. *Id.* at 564 (citation modified). Thus, for the Individual Defendants to be on notice that their actions would violate the Free Exercise Clause such that they are not covered by qualified immunity, there must be “clearly established” law that the facts here violate a “clearly established” Free Exercise right under the applicable standard of review.

We also examine whether there are factually similar cases to determine if the alleged constitutional Free Exercise

right was “clearly established” at the time of the challenged conduct. *A.K.H. ex. rel. Landeros v. City of Tustin*, 837 F.3d 1005, 1013 (9th Cir. 2016) (“To determine whether [the officer] violated clearly established law, we look to ‘cases relevant to the situation [the officer] confronted.’” (quoting *Brosseau v. Haugen*, 543 U.S. 194, 200 (2004))). Courts may not deny qualified immunity based on cases post-dating the time of the alleged act “[b]ecause the focus is on whether the officer had fair notice that her conduct was unlawful,” *Kisela v. Hughes*, 584 U.S. 100, 104 (2018), so we “turn[] to Supreme Court and Ninth Circuit law existing at the time of the alleged act” in 2021, *Cnty. House, Inc. v. City of Boise*, 623 F.3d 945, 967 (9th Cir. 2010) (citation modified).

*ii. MacDonald’s Allegations of the
Individual Defendants’ Misconduct*

The “right to [free exercise of religion] is quite clearly established by the [First Amendment],” “[b]ut if the test of ‘clearly established law’” was “applied at this level of generality,” it would “transform[] a guarantee of immunity” “into a rule of virtually unqualified liability” as long as plaintiffs “alleg[e] violation of extremely abstract rights.” *Anderson*, 483 U.S. at 639 (explaining principle in the Due Process context). To “define the contours of the right allegedly violated” we look to “what is really being litigated.” *LSO, Ltd. v. Stroh*, 205 F.3d 1146, 1158 (9th Cir. 2000).

Unlike many Free Exercise claims, MacDonald’s challenge is not to the passing or enforcement of a law or regulation that burdens her free exercise of religion, but to the Individual Defendants’ failure to grant her an exemption to a legal requirement for state healthcare employees to be vaccinated for COVID-19 amid a global pandemic. *See e.g.*,

Church of Lukumi Babalu Aye, Inc. v. City of Hialeah, 508 U.S. 520, 532–47 (1993). MacDonald’s allegations against the individual Board Defendants and the VERC Defendants slightly differ.¹ MacDonald alleges that the VERC Defendants violated her Free Exercise rights by denying MacDonald a vaccine exemption and forcing MacDonald to choose between her employment in the MBU or following her religious beliefs. MacDonald does not allege that the Board Defendants denied her vaccine exemption request but alleges that the Board Defendants “were, collectively responsible for establishing policies and protocols aimed at ensuring the health and safety of OHSU’s employees and patients during the COVID-19 pandemic” and “expressed overt hostility toward the religious beliefs of certain OHSU employees.” MacDonald also alleges that the “Board Defendants effectively declared that because multiple high-profile religious organizations had expressed approval of COVID-19 vaccines despite their connection to abortion,” MacDonald had “no excuse” for failing to

¹ We respectfully disagree with the dissent’s inclusion of OHSU as a defendant in its qualified immunity analysis, to the extent the dissent does so, because MacDonald asserts a Free Exercise Claim only against the Individual Defendants—not against OHSU. Moreover, even if MacDonald did assert a Free Exercise Claim against OHSU, a Free Exercise claim against OHSU is not proper because, as correctly observed by the district court, OHSU “is an arm of the state and is entitled to sovereign immunity under the Eleventh Amendment.” *MacDonald v. Oregon Health & Sci. Univ.*, No. 3:22-CV-01942-IM, 2024 WL 3316199, at *5 n.2 (D. Or. July 5, 2024) (quoting *United States ex rel. Doughty v. Or. Health & Scis. Univ.*, No. 3:13-CV-01306-BR, 2017 WL 1364208, at *3 (D. Or. Apr. 11, 2017) (“Every court that has addressed the issue and conducted an arm-of-the-state analysis has concluded OHSU is an arm of the State of Oregon entitled to Eleventh Amendment immunity.”) (collecting cases)).

vaccinate and “pressure[ed] Plaintiff to conform to the prevailing approved religion.”²

MacDonald’s allegations regarding the Individual Defendants’ misconduct are sparse,³ but essentially allege that the Individual Defendants engaged in impermissible religious hostility toward her beliefs by denying her a religious exemption based on her “fetal cell” and “bodily integrity or sanctity” objections to the COVID-19 vaccine. MacDonald fails, however, to allege any facts to support her conclusory claim that the September 30, 2021 email notice stating that vaccine objections based on “fetal cell” and “bodily integrity or sanctity” beliefs would not receive a religious exemption because these were “personal moral

² It is not apparent that MacDonald sufficiently alleged that the Board Defendants were “integral participants in the unlawful conduct” as required for a constitutional violation under 42 U.S.C. § 1983. *Keates*, 883 F.3d at 1241. MacDonald does not allege that the Board Defendants denied her exemption request but only that the VERC Defendants did so. MacDonald alleges that “OHSU circulated to its employees” the September 30, 2021 email notice but does not allege that the Board Defendants personally authored, ratified, or enforced the September 30, 2021 email notice. MacDonald alleges that the VERC Defendants denied her exemption request “pursuant to policies established by the Board Defendants” but fails to identify the policies the Board Defendants set, or allege that the Board Defendants personally drafted, reviewed, or ratified any specific policies. But for the purposes of the analysis here, we assume, *arguendo*, that MacDonald has alleged that the Board Defendants were “integral participants in the unlawful conduct.” *Keates*, 883 F.3d at 1241.

³ Other than OHSU’s October 7, 2021 email informing MacDonald that the Review Committee had denied MacDonald’s request for a religious exemption, MacDonald’s hostility allegations rely solely on the September 30, 2021 email notice OHSU sent to employees who had requested an exemption that provided “[e]xamples of beliefs that do not qualify for a religious exception.”

choices” demonstrates that the Individual Defendants were motivated by “overt hostility” in denying MacDonald an exemption. To the contrary, the September 30, 2021 email demonstrates an attempt to counter and correct misinformation about the COVID-19 vaccine, by informing employees that “no fetal tissue or cells are contained in any of the [COVID-19] vaccines”; “HEK-293 cell lines created over 50 years ago were used in confirmatory testing of the current mRNA vaccines” but “played no role in their development or production”; and “[c]ells from the same line have commonly been used in biologic research since the late 70s,” and are “used in testing of many common medicines, including Tylenol, Advil, Aspirin, Claritin, Benadryl, Pepto-Bismol, Mucinex, Tums and Prilosec, among many others.” MacDonald failed to allege any facts to contest the accuracy of these statements combatting misinformation or to support her conclusory claim that the Individual Defendants were motivated instead by religious hostility in denying her exemption request.

At bottom, MacDonald alleges that the Individual Defendants infringed on MacDonald’s right to refuse a COVID-19 vaccine and continue to work in close-contact with medically vulnerable patients—including newborns, pregnant women, postpartum mothers, and patients undergoing cancer treatment—during the height of a deadly, global, COVID-19 pandemic, based on her religious beliefs regarding “fetal cells,” and “bodily integrity and sanctity” concerns. At the time the Individual Defendants denied MacDonald an exemption, there was no case, much less a body of case law, that clearly established a healthcare worker’s Free Exercise right to an exemption from a state-law mandated vaccine based on religious objections at the height of a global pandemic.

iii. Application

None of the three cases MacDonald cites regarding the COVID-19 pandemic or vaccine mandates—*Roman Catholic Diocese of Brooklyn v. Cuomo*, 592 U.S. 14 (2020) (per curiam), *Jacobson v. Massachusetts*, 197 U.S. 11 (1905), or *Keene v. City & County of San Francisco*, No. 22-16567, 2023 WL 3451687 (9th Cir. May 15, 2023)—“clearly establishes” that MacDonald had a right to a religion-based vaccine exemption. *Roman Catholic* involved a direct Free Exercise challenge to the New York Governor’s Executive Order regarding COVID-19 group gathering restrictions—not vaccine mandates—that expressly “single[d] out houses of worship for especially harsh treatment.” 592 U.S. at 17.⁴ By contrast, here, the Individual Defendants did not single out religion for “especially harsh treatment,” but rather, favorable treatment because individuals with vaccine objections based in secular beliefs did not have access to any exemption process. *Id.*

MacDonald’s reliance on *Jacobson v. Massachusetts*, 197 U.S. 11 (1905) is also misplaced; the case instead undermines MacDonald’s position. In *Jacobson*, the Supreme Court upheld a smallpox vaccine mandate where the plaintiff claimed the mandate violated his Fourteenth Amendment right to liberty. 197 U.S. at 27–30. The Supreme Court noted that failing to uphold the vaccine mandate would “strip the legislative department of its

⁴ In November 2022, over a year after the Individual Defendants denied MacDonald’s exception request, this Court observed that even in *Roman Catholic*’s “pandemic closures” context, the law was not yet clearly established because “[t]he debate over pandemic closures and the Free Exercise Clause continued—and continues—even after *Roman Catholic Diocese* was decided.” *Horizon Christian Sch. v. Brown*, No. 21-35947, 2022 WL 17038695, at *2 (9th Cir. Nov. 17, 2022).

function to care for the public health and the public safety when endangered by epidemics of disease.” *Id.* at 37. The *Jacobson* Court recognized that the government has an interest in “preventing the spread of [disease] . . . to protect the public health.” *Id.* at 30–31. Years later, the *Roman Catholic* Court reiterated the same interest. 592 U.S. at 18 (“[s]temming the spread of COVID–19 is unquestionably a compelling interest”). Protecting public health and safety remains a compelling government interest. Neither of these two cases “clearly establishes” MacDonald’s alleged right to a religious exemption to a legal mandate requiring healthcare workers to be vaccinated during a global pandemic while working with vulnerable populations in a hospital setting.

Keene v. City & County of San Francisco also fails to support MacDonald’s position because *Keene* was decided almost two years after the Individual Defendants denied MacDonald an accommodation. No. 22-16567, 2023 WL 3451687, at *1 (9th Cir. May 15, 2023). The Individual Defendants’ actions thus cannot be assessed under *Keene* because *Keene* was not “law at the time of the conduct.” *Kisela*, 584 U.S. at 104. *Keene*, moreover, did not address qualified immunity, the Free Exercise Clause, or a motion to dismiss. In *Keene*, the plaintiffs asserted Title VII failure to accommodate claims after they were denied religious exemptions to the defendants’ vaccine mandate and moved for a preliminary injunction requiring the City and County of San Francisco to accommodate their religious beliefs. *Keene*, 2023 WL 3451687, at *1. The *Keene* panel held that the district court erred in evaluating the first prong of a Title VII failure to accommodate *prima facie* case—whether an employee has a bona fide religious belief—by concluding that neither “Plaintiff ha[d] demonstrated that their religious beliefs are sincere or that those beliefs conflict with

receiving the COVID-19 vaccine.” *Id.* at *2. Although “an assertion of a sincere religious belief is generally accepted” in the Title VII failure to accommodate prima facie analysis, *id.*, the district court’s failure to properly assess a Title VII failure to accommodate prima facie case has no bearing on the qualified immunity analysis for a Free Exercise claim.

MacDonald’s other cited cases involve substantially different facts and do not articulate a clearly established right under the Free Exercise Clause in the circumstances of her case. *See Lukumi*, 508 U.S. at 532–47 (holding that a city ordinance that allowed non-religious animal killing but prohibited ritual animal sacrifice targeted the Santeria religion, served no compelling government interest, was not narrowly tailored, and violated the Free Exercise Clause); *Masterpiece Cakeshop Ltd. v. Colo. C.R. Comm’n*, 584 U.S. 617, 634 (2018) (holding that the Colorado state commission violated the Free Exercise Clause when it concluded that a baker was required under state law to create cakes for a same-sex wedding because the commission showed “clear and impermissible hostility” to baker’s religious beliefs in public meetings and upheld as lawful other bakers’ refusal to create cakes with images stating disapproval of same-sex marriage with religious text). MacDonald’s reliance on these factually distinct Free Exercise cases demands analysis of the alleged constitutional violation at an impermissibly “high level of generality” and “avoids the crucial question” of “whether the official acted reasonably in the particular circumstances that he or she faced,” which the Supreme Court has “repeatedly stressed” we may not do. *District of Columbia v. Wesby*, 583 U.S. 48, 62–63 (2018) (citing *Plumhoff v. Rickard*, 572 U.S. 765, 779 (2014)).

Similarly, MacDonald’s cases regarding the denial of unemployment benefits and contraceptive mandates present

substantially distinct and inapposite factual circumstances and legal claims and thus, did not provide fair notice to the Individual Defendants. See *Thomas v. Rev. Bd. of Ind. Emp. Sec. Div.*, 450 U.S. 707, 719 (1981) (holding that state could not withhold unemployment benefits from someone who left a job because his religious beliefs would not allow him to make weapons); *Sherbert v. Verner*, 374 U.S. 398, 401–02 (1963) (holding same for individual who had refused work based on the individual’s religious beliefs); *Frazee v. Ill. Dep’t of Emp. Sec.*, 489 U.S. 829, 835 (1989) (holding same and noting that “there may exist state interests sufficiently compelling to override a legitimate claim to the free exercise of religion” but “[n]o such interest has been presented here”); *Burwell v. Hobby Lobby Stores, Inc.*, 573 U.S. 682, 736 (2014) (analyzing only the Religious Freedom Restoration Act of 1993 (“RFRA”) in holding that a government regulation requiring private employers to pay for contraceptives violated RFRA); *Little Sisters of the Poor Saints Peter & Paul Home v. Pennsylvania*, 591 U.S. 657, 687 (2020) (holding that the interim final rules exempting employers with religious or moral objections from contraceptive mandate were proper under Administrative Procedures Act rulemaking procedures). These cases failed to provide any notice to the Individual Defendants that denying a vaccine exemption to a healthcare worker amid a pandemic would be a “clearly established” violation of the Free Exercise Clause “in the specific context” of this case. *Mullenix*, 577 U.S. at 12 (citation modified).

MacDonald also cites and quotes *Dodge v. Evergreen School District #114*, to argue that constitutional principles established in other contexts can apply “in novel factual circumstances,” if the “case involves mere application of settled law to a new factual permutation.” 56 F.4th 767, 784

(9th Cir. 2022) (citation modified). In *Dodge*, a principal threatened a teacher’s employment if he continued to bring a “Make America Great Again” hat to teacher-only trainings. *Id.* at 772–74. At the time of the principal’s actions, the Supreme Court had issued two decisions involving speech restrictions in public schools. *See id.* at 784–86. This Circuit applied those two Supreme Court decisions and prior Ninth Circuit decisions to the similar facts at issue in *Dodge*. *Id.* at 786–87. In other words, prior to *Dodge*, the Supreme Court had articulated certain principles in factual circumstances involving the same government action and context as those in *Dodge*—respectively speech restrictions and public schools. By contrast, MacDonald cites to no governing precedent regarding a state hospital’s response to a registered nurses’ religious exemption request to vaccine mandates during a pandemic. Nor is there binding precedent regarding the Free Exercise Clause where a government actor denies a religious exemption request submitted through a religious accommodation process. Thus, MacDonald’s case is not a “new factual permutation” of already “settled law,” but instead presents “novel factual circumstances” because no court had yet provided a decision, much less settled law in this factual context, when the Individual Defendants denied MacDonald’s exemption request. *See Dodge*, 56 F.4th at 784.⁵

Furthermore, MacDonald’s failure to cite any Free Exercise case involving similar facts such that the Individual Defendants had fair notice of how the Free Exercise

⁵ *Dodge v. Evergreen Sch. Dist. #114*, 56 F.4th 767 (9th Cir. 2022) was also decided after the Individual Defendants denied MacDonald an exception to work unvaccinated, and thus does not constitute relevant, existing precedent “at the time of the alleged act.” *Cnty. House, Inc.*, 623 F.3d at 967 (citation modified).

framework would apply in the circumstances presented, including what standard of review would apply, also demonstrates the lack of “clearly established” law applicable here. At most, the Individual Defendants were on notice that their actions would trigger rational basis review. In 2021, there was no clearly established law that strict scrutiny applies to facts where, as here, there are no allegations that the Individual Defendants “treat[ed] *any* comparable secular activity more favorably than religious exercise” such that the Individual Defendants’ actions were “not neutral and generally applicable.” *Tandon v. Newsom*, 593 U.S. 61, 62 (2021) (emphasis in original) (citing *Roman Catholic*, 592 U. S. at 18–20). By contrast, the Individual Defendants arguably provided *preferential* treatment toward healthcare employees with religious beliefs versus healthcare employees with secular beliefs—who had no option to seek any exemption. Furthermore, the September 30, 2021 email stated that any employee who objected based on “[c]oncerns over vaccine safety or content” would not be entitled to a religious exemption because “[t]hese are not religious arguments and [are] often inconsistent with proven facts.” Therefore, all individuals who objected based on “vaccine safety or content” concerns including “fetal cell” or “bodily integrity or sanctity” concerns—no matter if such concerns were based in Christian, Muslim, other religious beliefs, or secular beliefs—were treated equally and remained subject to the mandatory vaccination policy.⁶ MacDonald fails to

⁶ This is a different circumstance from the one presented in *Lukumi*. See 508 U.S. at 543–46. There, to advance the city’s interest in preventing animal cruelty, a city ordinance prohibited the killing of and disposal of animals in Santeria sacrificial rituals but did not prohibit comparable secularly motivated activities such as hunting or the extermination of mice or pests that likewise endangered the city’s interest in preventing

cite any clearly established law to demonstrate that the Individual Defendants' had fair notice that their actions were not neutral, generally applicable, and subject to rational basis review.

Moreover, no caselaw is before us that would have provided the Individual Defendants with fair notice in 2021 that the Individual Defendants' interest in preventing the spread of COVID-19, thereby protecting public health and safety, would not satisfy rational basis review. *See Roman Catholic*, 592 U.S. at 18 (“[s]temming the spread of COVID-19 is unquestionably a compelling interest”); *Jacobson*, 197 U.S. at 30–34 (recognizing that government had interest in “preventing the spread of [disease] . . . to protect the public health”); *Brox v. Woods Hole*, 164 F.4th 37, 50 (1st Cir. 2026) (defendants had “legitimate interests in preventing the spread of COVID-19 and in protecting the health and safety of its employees, customers, and vendors”) (collecting cases). Thus, the only clearly established law regarding the specific factual circumstances here supports the Individual Defendants' legitimate and compelling government interest in protecting the public health during a deadly global pandemic.

Even assuming, *arguendo*, that strict scrutiny applies, MacDonald cites no case law that would have provided fair notice to the Individual Defendants that denying MacDonald a vaccine exemption would not survive strict scrutiny. The exemption denial was “narrowly tailored” to the “compelling government interest” of preventing the spread of COVID-19—especially when MacDonald's job as a

animal cruelty. *See id.* (city ordinance was not “generally applicable” because it prohibited “conduct motivated by religious beliefs” but not similar conduct motivated by secular activities).

registered nurse in the Mother Baby Unit required close contact with vulnerable populations. The COVID-19 gathering restrictions on houses of worship in *Roman Catholic*, were not as stringently applied to gatherings for secular activities, prompting the Court to find that the more severe gathering restrictions on houses of worship were not “narrowly tailored” to serve the “compelling interest” of “[s]temming the spread of COVID-19.” 592 U.S. at 18. MacDonald does not contest that exemptions were not provided to employees with secular objections. Nor does MacDonald cite “clearly established” law that would provide the Individual Defendants fair notice that under the facts here, courts would find that “less restrictive” measures were available to “address [the government’s] interest in reducing the spread of COVID,” amongst its employees and patients, including vulnerable populations in the MBU. *See Tandon*, 593 U.S. at 63.

Because MacDonald and the dissent fail to cite any governing precedent articulating principles in factual circumstances involving sufficiently similar government action and circumstances as those here—a state official’s denial of a religious exemption to a state governor’s vaccine mandate—the dissent must and does concede that this case presents “novel factual circumstances.” Dissent at 49. To address this concession, the dissent relies on the statement in *Hope v. Pelzer* that “officials can still be on notice that their conduct violates established law even in novel factual circumstances.” 536 U.S. 730, 741 (2002). But the Supreme Court’s analysis in *Pelzer* makes clear the complete dearth of clearly established law sufficient to provide fair notice to the Individual Defendants that their actions could be unconstitutional.

In *Pelzer*, the Supreme Court held that prison guards were on notice that handcuffing a shirtless prisoner to a “hitching post” for seven hours with no bathroom breaks and limited water “while the sun burned his skin” violated the Eighth Amendment. *Id.* at 734–35, 741–42. *Pelzer* applied the same qualified immunity “clearly established” standard that the majority applies here, and states that “the salient question . . . is whether the state of the law in 1995 gave respondents fair warning that their alleged treatment of [the prisoner] was unconstitutional.” *Id.* at 741. The Supreme Court found that “in light of binding Eleventh Circuit precedent” holding that “handcuffing inmates to the fence and to cells for long periods of time” violated the Eighth Amendment, and the DOJ’s prior advisement to the Alabama Department of Corrections to “cease use of the hitching post in order to meet constitutional standards,” a “reasonable person would have known” that the prison guards’ actions violated “clearly established law.” *Id.* at 741–45 (citation modified). In other words, like the Ninth Circuit in *Dodge*, the Supreme Court held that the *Pelzer* defendants were not entitled to qualified immunity because there was “clearly established” prior law that the same government action—tying a prisoner to a stationary object—in the same context—prisons—violated the Constitution. *See id.* Where, as here, MacDonald cites to no prior case involving a similar government action and context—a state official’s denial of a religious exemption to a state governor’s vaccine mandate during a global pandemic—there was no “clearly established” law sufficient to provide notice to the Individual Defendants that their actions were unconstitutional in 2021.

The dissent asserts that our decision today will allow defendants to mischaracterize religious belief or practice as

a “personal moral choice” to deny religious exemptions with impunity to a Muslim woman observing the wearing of a hijab, a Sikh man who maintains a beard, a Seventh-day Adventist who observes the Sabbath, and a Catholic doctor who refuses to perform an abortion. Dissent at 47. In these hypothetical circumstances, however, there *is* clearly established law that may preclude potential defendants who deny religious exemption requests based on these beliefs and practices from qualified immunity. See e.g., *EEOC v. Abercrombie & Fitch Stores, Inc.*, 575 U.S. 768, 773–74 (2015) (sustaining a Muslim woman’s right to observe wearing a hijab in the workplace); *Holt v. Hobbs*, 574 U.S. 352, 356, 364–65 (2015) (holding that a state department of corrections policy prohibiting inmates from growing beards burdened a Muslim man’s religious exercise and was not in furtherance of or the least restrictive means to achieve a compelling government interest); *Singh v. Berger*, 56 F.4th 88, 110 (D.C. Cir. 2022) (remanding to “district court for the prompt entry of a preliminary injunction requiring the Marine Corps to allow [two Sikh men] to enlist without shaving their heads or beards”); *Groff v. DeJoy*, 600 U.S. 447, 468, 470 (2023) (holding that a denial of an accommodation to a worker not to work on Sabbath for religious reasons requires a showing of “substantial increased costs” on the employer rather than “de minimis” costs); *Food & Drug Admin. v. All. for Hippocratic Med.*, 602 U.S. 367, 369 (2024) (“Federal law protects doctors from repercussions when they have ‘refused’ to participate in an abortion.”) (quoting 42 U.S.C.A. § 300a-7(c)(1)).⁷

⁷ The Supreme Court has also observed that no instances had been identified “where a doctor was required, notwithstanding conscience objections, to perform an abortion or to provide other abortion-related treatment that violated the doctor’s conscience.” *All. for Hippocratic*

These hypothetical defendants would thus have “fair notice” from Supreme Court and appellate case law that such denials are a potential constitutional religious violation such that qualified immunity may not apply.⁸

For similar reasons, the dissent’s use of an unlikely hypothetical race-based policy to argue that the majority’s qualified immunity analysis in the context of religious discrimination is flawed. The dissent asserts that because a race-based policy that “prohibited COVID vaccine exemptions for Asian employees” would not entitle defendants to qualified immunity based on the “novel factual circumstances” of a global pandemic, the majority’s qualified immunity analysis in the context of religious discrimination is incorrect. Dissent at 51. Again, with regard to race, there is longstanding, “clearly established” law that would preclude qualified immunity to hypothetical defendants who denied an exemption request based on race because the defendants would have fair notice that doing so would violate an entire host of race discrimination laws.⁹

Med., 602 U.S. at 388 (There was no “evidence in the record . . . of hospitals overriding or failing to accommodate doctors’ conscience objections” to abortion). Likewise, here, OHSU provided MacDonald an accommodation such that she did not have to assist in abortions.

⁸ Whether qualified immunity would be available to these hypothetical defendants would also require a showing that the denial of an exemption request on these bases would not survive the applicable level of scrutiny such that there is a Free Exercise violation on the second prong of the qualified immunity analysis.

⁹ This is also an inapt analogy. The analogous comparator to the dissent’s discrimination against Asian employees in the religion context is if the Individual Defendants’ September 30, 2021 email targeted certain religious beliefs such as stating that it would not provide religious exemptions to Seventh Day Adventists but would for other religious

See e.g., Yick Wo v. Hopkins, 118 U.S. 356, 370 (1886) (striking down local law as unenforceable because denial of permits solely to Chinese-owned laundries violated the Equal Protection Clause).

Even if we set aside the specific factual context here of an ongoing deadly pandemic, there is no “clearly established” law before us on religious constitutional violations regarding denials of exemptions to vaccine mandates or objections to medical products based on “fetal cell” and “bodily sanctity” concerns or “divine guidance” from God. Nor is there clearly established Free Exercise case law concerning a religious accommodation process that would provide fair notice to the Individual Defendants that denying an exemption here would violate the Free Exercise Clause.

Moreover, even if we disregard the specific factual circumstances here and erroneously define the infringed upon constitutional right at a higher level of generality, which both this Circuit and the Supreme Court have “repeatedly stressed” we may not do, *Wesby*, 583 U.S. at 63 (citing *Plumhoff*, 572 U.S. at 779), it is not “clearly established” that the Free Exercise Clause confers a constitutional right to a religious exemption that would permit an individual to disregard a law enacted to protect public health and safety—an exemption that a person with secular objections could neither apply for nor be granted. To the contrary, the Supreme Court has stated that “to say that a nondiscriminatory religious-practice exemption is

beliefs. But here, anyone with objections based on vaccine safety and content was not eligible for an exemption to a legal mandate to be vaccinated, no matter if those objections stem from secular, Roman Catholic, Muslim or any other religion’s beliefs.

permitted, or even that it is desirable, is not to say that it is constitutionally required.” *Smith*, 494 U.S. at 890.

Lastly, denying the Individual Defendants, who had no notice that their conduct could be unlawful, the benefit of qualified immunity subjects such defendants to individual liability and undermines the very purpose of qualified immunity to “ensure that before [government officers] are subjected to suit, officers are on notice that their conduct is unlawful.” *Pelzer*, 536 U.S. at 739 (citation modified). Denying qualified immunity may also destabilize and undermine the public health and safety goals of laws, regulations, and orders, like the Vaccine Mandate here, of democratically elected legislators and executive officers. If such laws require the religious exemption process urged by MacDonald, individual government actors would be incentivized to grant religious exemptions to these legal mandates to avoid the risk of individual liability, even if there was no “clearly established” law to provide notice that denying a religious exemption request in the specific factual circumstances at issue would violate the Constitution.¹⁰

Because no “clearly established” law provided the Individual Defendants fair notice in 2021 such that it would have “be[en] clear” that the Individual Defendants’ denial of a vaccine exemption request “was unlawful in the situation . . . confronted,” the district court correctly found

¹⁰ Denying qualified immunity here would also veer dangerously close to asking the Courts to “deem[]” as “*presumptively invalid*, as applied to [any] religious objector, every regulation of conduct that does not protect an interest of the highest order”—a “luxury” the Supreme Court has advised “we cannot afford” because “we are a cosmopolitan nation made up of people of almost every conceivable religious preference.” *Smith*, 494 U.S. at 888 (citation modified).

that the Individual Defendants were entitled to qualified immunity. *Saucier*, 533 U.S. at 202.

II. MacDonald's Title VII Failure to Accommodate Claim and Undue Hardship

We agree with the district court's granting of summary judgment to OHSU on MacDonald's Title VII failure to accommodate claim because OHSU demonstrated that it could not have accommodated Macdonald without undue hardship.

A. Religious Discrimination Under Title VII and Undue Hardship

As amended, Title VII precludes any employer from “discharg[ing] any individual” or “discriminat[ing] against any individual . . . because of such individual’s . . . religion.” 42 U.S.C. § 2000e-2(a)(1). This Circuit has repeatedly held that “[a] claim for religious discrimination under Title VII can be asserted under several different theories, including . . . failure to accommodate.” *Petersen v. Snohomish Reg'l Fire & Rescue*, 150 F.4th 1211, 1216 (9th Cir. 2025) (quoting *Peterson v. Hewlett-Packard Co.* 358 F.3d 599, 603 (9th Cir. 2004) (separately analyzing both Title VII religious disparate treatment claim and Title VII religious failure to accommodate claim)). MacDonald alleges religious discrimination based on a failure to accommodate theory and not a disparate treatment intentional discrimination theory.¹¹

¹¹ On December 22, 2023, MacDonald moved to amend her complaint to add a Title VII disparate treatment claim against OHSU but later withdrew the motion. MacDonald conceded at oral argument that MacDonald has not alleged a Title VII religious discrimination claim based on disparate treatment.

“Claims of failure to accommodate a religious objection are analyzed under a burden-shifting framework.” *Detwiler v. Mid-Columbia Med. Ctr.*, 156 F.4th 886, 893 (9th Cir. 2025). First, a plaintiff must demonstrate a *prima facie* case that:

(1) he had a bona fide religious belief, the practice of which conflicts with an employment duty; (2) he informed his employer of the belief and conflict; and (3) the employer discharged, threatened, or otherwise subjected him to an adverse employment action because of his inability to fulfill the job requirement.

Snohomish, 150 F.4th at 1216 (citation modified). The burden then shifts to the employer to show either that “it initiated good faith efforts to accommodate reasonably the employee’s religious practices or that it could not reasonably accommodate the employee without undue hardship.” *Id.* OHSU did not challenge MacDonald’s ability to make out a *prima facie* case or argue that OHSU “initiated good faith efforts to accommodate reasonably the employee’s religious practices,” so the only defense before us is undue hardship. *Id.*

“Undue hardship is an affirmative defense.” *Bolden-Hardge v. Off. of Cal. State Controller*, 63 F.4th 1215, 1224 (9th Cir. 2023) (citation modified). In *Groff v. DeJoy*, the Supreme Court clarified that the “undue hardship” defense requires more than a showing of *de minimis* costs but a showing of “substantial increased costs in relation to the conduct of [the employer’s] particular business.” 600 U.S. 447, 470 (2023) (citation modified). Courts must account

for “all relevant factors . . . including the particular accommodations at issue and their practical impact in light of the nature, size and operating cost of [an] employer.” *Id.* at 470–71. The Supreme Court clarified that potential co-worker “bias or hostility to a religious practice” could not be considered an “undue hardship.” *Id.* at 472. *Groff* left “the context-specific application of th[e] clarified [undue hardship] standard to the lower courts in the first instance,” *id.* at 473, and has not yet revisited the standard.

This Circuit recently applied *Groff* in affirming grants of summary judgment to defendants on Title VII failure to accommodate COVID-19 vaccine exemption claims because the employers “cleared [*Groff*’s] substantial-burden bar.” *Williams v. Legacy Health*, 174 F.4th 1201, 1206 (9th Cir. 2026) (affirming grant of summary judgment on Title VII failure to accommodate vaccine exemption claims because the hospitals demonstrated that accommodating the employees’ beliefs would have imposed an “undue hardship”); *see also Snohomish*, 150 F.4th at 1220 (affirming grant of summary judgment to a county defendant which provided fire suppression and emergency medical services because “allowing unvaccinated firefighters to continue working, even with accommodations” would have resulted in “significant health and safety costs”).

In doing so, we agreed with our sister courts, which have consistently upheld grants of summary judgment to healthcare related defendants on the basis that accommodating requests for religious exemptions from COVID-19 vaccine mandates posed an undue hardship because of the health, safety, operational, and financial burdens unvaccinated workers posed to patients and healthcare staff. *See, e.g., Melino v. Bos. Med. Ctr.*, 127 F.4th 391 (1st Cir. 2025) (affirming grant of summary

judgment on undue hardship grounds to hospital against nurse); *Bushra v. Main Line Health, Inc.*, No. 24-1117, 2025 WL 1078135 (3d Cir. Apr. 10, 2025) (same against physician); *Hall v. Sheppard Pratt Health Sys., Inc.*, 155 F.4th 747 (4th Cir. 2025) (affirming grant of summary judgment on undue hardship grounds to hospital against employee who refused to be vaccinated); *Miller v. Charleston Area Med. Ctr., Inc.*, No. 24-2129, 2026 WL 35966 (4th Cir. Jan. 6, 2026) (same); *Kizer v. St. Jude's Child.'s Rsch. Hosp.*, 2024 WL 4816856 (6th Cir. Nov. 18, 2024) (same); *Wise v. Child.'s Hosp. Med. Ctr. of Akron*, 2025 WL 1392209 (6th Cir. May 14, 2025) (same); *Wright v. Brooklyn Hosp. Ctr.*, No. 24-2632, 2026 WL 1141057 (2d Cir. Apr. 27, 2026) (summary order) (affirming same but on motion to dismiss).

The Ninth Circuit has also “crystalized several aspects of the *Groff* test.” *Legacy Health*, 174 F.4th at 1206. First, *Groff*’s “‘substantial additional costs’ . . . need not be exclusively monetary but can extend to “‘health and safety costs’ and ‘operational burdens’” as well as traditional ‘financial burdens.’” *Id.* (quoting *Snohomish*, 150 F.4th at 1218); *see also Groff*, 600 U.S. at 475 (Sotomayor, J., concurring) (clarifying that “undue hardship on the conduct of a business may include undue hardship on the business’s employees”). *Groff*’s “substantial increased costs” also “need not be realized prior to raising an undue-hardship defense;” instead, a “realistic” and not “hypothetical” risk of undue hardship” is sufficient. *Id.* (citation modified). Furthermore, this Court does not “‘judge [a given employer] by the responses taken by other [employers]’” because “[t]he test boils down to undue hardship in the context of the ‘particular business’ before us. *Id.* (emphasis in original)

(quoting *Snohomish*, 150 F.4th at 1222; *Groff*, 600 U.S. at 470).

B. OHSU Demonstrated that Accommodating MacDonald Posed an Undue Hardship

We consider OHSU’s assertion of undue hardship in accommodating MacDonald’s request for a vaccine exemption. In discovery, MacDonald outlined the accommodations that were available: “wear[ing] a mask, test[ing] daily, stay[ing] home if sick,” “[w]earing additional [PPE] as required when taking care of patients with active COVID 19 symptoms,” and “submit[ing] to all other health precautions that applied to all nurses, vaccinated or otherwise.” In OHSU’s motion for summary judgment, OHSU identified substantial health and safety, operational, and financial costs if it allowed MacDonald to continue working in the MBU, while unvaccinated, in close contact with vulnerable patients.¹² Consistent with our prior panels and sister courts, we agree with the district court that OHSU would have faced undue hardship in accommodating MacDonald’s request for a vaccine exemption.

i. Health and Safety Risks

Circuit courts agree that the direct risk unvaccinated individuals posed to the health and safety of patients and

¹² At summary judgment, OHSU relied on three extensive declarations and one expert report: (i) a declaration from Dr. Renee Edwards, OHSU’s Chief Medical Officer, (ii) a declaration from Dr. Marcel Curlin, Medical Director of OHSU’s Occupational Health Department in 2021, (iii) a declaration from Molly Blaser, who worked in the MBU as a registered nurse and serves as OHSU’s Director of Nursing Services which involves managing the MBU and its nurses, and (iv) an expert report from Dr. Seth Cohen, an expert in the spread, mitigation, and treatment of infectious diseases including COVID-19.

other employees are “substantial additional costs” demonstrating “undue hardship.” *See e.g., Legacy Health*, 174 F.4th at 1206, 1208; *Snohomish*, 150 F.4th at 1220; *Bushra*, 2025 WL 1078135, at *2 (granting summary judgment to hospital because “[Plaintiff-doctor] treated vulnerable patients in the normal course of his clinical duties,” and hospital “provided un rebutted expert testimony that unvaccinated healthcare workers . . . presented an increased risk of transmitting COVID-19 to others, particularly when they interacted with vulnerable groups”).

OHSU also presented extensive, undisputed evidence that unvaccinated individuals were more likely to contract and spread COVID-19. In his declaration, OHSU’s Medical Director of Occupational Health affirmed that in 2021, OHSU concluded that mandatory vaccination would protect both patients and employees because medical data and science at that time showed that unvaccinated workers were more likely to contract and spread COVID-19. Compared to non-vaccination measures like PPE and social distancing, vaccination provided additional, unique protection uncompromised by human error. An expert in the spread, mitigation, and treatment of infectious diseases including COVID-19, opined that because of COVID-19’s “threat to patients and healthcare workers in the summer and fall of 2021,” mandatory COVID-19 vaccination policies were critical to protecting employees and patients because “no single measure was 100% effective on its own in protecting individuals from COVID-19.” A combination of vaccination and other measures such as PPE, social distancing, and testing would provide maximum protection against COVID-19. MacDonald, moreover, worked in the MBU where its patients—pregnant mothers, newborns, cancer patients and other immunocompromised patients—

were especially vulnerable to developing severe or critical life-threatening COVID-19.

Because accommodating MacDonald would have increased the risk of severe COVID-19 illness amongst patients and illness amongst OHSU's employees who provided hands-on, lifesaving, essential medical services, OHSU's evidence thus established that the health and safety risks posed to OHSU's patients and employees presented a "substantial [hardship] in the context of [OHSU]'s business," *Groff*, 600 U.S. at 471, "serv[ing] the people of the State of Oregon" and "deliver[ing]" health care "in the manner that . . . best promotes the public welfare of the people of the State of Oregon." Or. Rev. Stat. § 353.030(1), (4); *see also Wise*, 2025 WL 1392209, at *5 (affirming undue hardship finding because the "hospital cares for particularly vulnerable patients whose lives could be placed at risk if they were to contract the virus" and because "[i]t was thus paramount that Defendant take the highest precautions to ensure the safety of those patients"); *Rodrique v. Hearst Commc'ns, Inc.*, 126 F.4th 85, 91 (1st Cir. 2025) (finding undue hardship for employer broadcast news station where "the record demonstrate[d] that [defendant] relied 'on the objective, scientific information available to [it]'" in denying COVID-19 vaccine exemption (quoting *Bragdon v. Abbott*, 524 U.S. 624, 649–50 (1998))).

ii. Operational and Financial Costs

Accommodating MacDonald also would have imposed substantial operational and financial costs on OHSU. In 2021, MBU faced an ongoing nurse shortage that was further exacerbated by COVID-19. Not only would unvaccinated nurses like MacDonald be more likely to contract COVID-19 and miss work, but unvaccinated nurses would also be at

higher risk of infecting other MBU nurses and OHSU personnel, compounding existing staffing and care shortages. Here, as in *Snohomish*, “allowing unvaccinated [healthcare workers] to work—even if they were masked, tested regularly, and maintained social distancing—put other [healthcare workers] at risk.” 150 F. 4th at 1220. “[G]iven the community-critical nature of [OHSU]’s mission,” OHSU “could not afford” or “assume lightly” the risk of “hav[ing] substantial numbers of its [healthcare workers] on sick leave.” *Id.* Moreover, removing MacDonald from the MBU would have required OHSU either to have other vaccinated MBU nurses cover MacDonald’s work or hire and pay for a replacement nurse on top of MacDonald’s original salary. Because of the ongoing nursing shortage and the fact that MBU nurses have specialized training, OHSU would have incurred substantial costs if it removed or transferred MacDonald from the MBU. Title VII does not require OHSU to bear such “substantial costs” to operate its business. *See id* at 1221; *Legacy Health*, 174 F.4th at 1206–07.

The district court did not err in finding that MacDonald’s evidence, submitted in opposition to OHSU’s motion for summary judgment, was either inadmissible hearsay, lacked personal knowledge, required an expert opinion which MacDonald did not provide, or failed to provide support for MacDonald’s claimed propositions. OHSU’s evidence regarding the “undue hardship” it would have faced in accommodating MacDonald is undisputed and “so one-sided that [OHSU] must prevail as a matter of law.” *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 251–52 (1986). Consistent with our prior panels and sister courts, we agree with the district court that OHSU would have faced undue

hardship in accommodating MacDonald's request for a vaccine exemption.

C. MacDonald's Pretext Arguments

MacDonald does not dispute OHSU's evidence of undue hardship on appeal but instead argues that the district court erred in discounting MacDonald's evidence of discriminatory animus as immaterial to the undue hardship analysis because evidence of discriminatory motives goes to OHSU's credibility and should be submitted to the jury. MacDonald, however, cites no Supreme Court, Ninth Circuit, or other Circuit case that imports a "pretext" or "discriminatory motives" analysis into the "undue hardship" failure to accommodate analysis—because there is none.¹³

Even assuming, *arguendo*, that pretext is applicable in the failure to accommodate undue hardship analysis, MacDonald has not presented a triable issue of material fact establishing that OHSU's demonstrated substantial economic and noneconomic costs in allowing MacDonald to work while unvaccinated were mere pretext. MacDonald proffers only two pieces of evidence to support her contention that OHSU acted with discriminatory intent: (i) OHSU's September 30, 2021 email notice to employees and supervisors of employees who had requested an

¹³ Though not applicable here, *McDonnell Douglas Corp. v. Green*, 411 U.S. 792 (1973), "establishes the traditional framework for evaluating disparate-treatment claims that rest on circumstantial evidence." *Ames v. Ohio Dep't of Youth Servs.*, 605 U.S. 303, 306 (2025). The *McDonnell Douglas* burden-shifting framework does include a pretext element in its burden-shifting framework in disparate treatment claims. *McDonnell Douglas*, 411 U.S. at 802–04. MacDonald, however, conceded at oral argument that she did not allege a Title VII religious discrimination disparate treatment claim. *See also supra* n. 11.

exemption, and (ii) OHSU's October 7, 2021 email to MacDonald denying her religious exemption request. MacDonald argues that OHSU's email notices show that it was "MacDonald's beliefs," and "not her position as a nurse" in the MBU that disqualified her from an exemption because the notices "say nothing at all about any hardship, undue or otherwise" if MacDonald were allowed to continue working. MacDonald's argument ignores that OHSU's communications with MacDonald repeatedly referred to the hardships OHSU faced. For example, in OHSU's October 7, 2021 email to MacDonald denying her exemption request, OHSU stated:

OHSU firmly stands behind the community benefit of vaccination against COVID-19. The decision not to get vaccinated can have negative consequences to the unvaccinated person and to those around them. While we acknowledge each individual's right to their opinion and choice about vaccination, we also need to ensure OHSU sets policy to protect our patients and our community.

Though OHSU did not expressly use the words "undue hardship," it described the hardship OHSU faced in keeping its employees, patients, and general community safe during a deadly pandemic if it allowed unvaccinated healthcare workers to continue working.

MacDonald also asserts that OHSU's concerns about "staffing issues" and the "impair[ment] of critical operations" were disingenuous because, if there truly were staffing issues, OHSU should have accommodated MacDonald instead of terminating her employment.

MacDonald overlooks that if she were permitted to continue working in the MBU with vulnerable populations without a COVID-19 vaccine amidst a global pandemic, OHSU would not only have to manage the risk to MacDonald's own health, but also the risk to the health of her co-workers, patients, and anyone she encountered while working in the MBU.

Accordingly, the district court correctly observed that there was no "support[]" for "the inference that Plaintiff was subjected to religious animus." Even if pretext were a part of the analysis, MacDonald failed to raise any genuine material issue of triable fact that OHSU's concern for the health of its patients and healthcare workers was merely pretext for engaging in religious discrimination when it denied MacDonald's vaccine exemption request. OHSU thus "cleared [*Groff's*] substantial-burden bar" and demonstrated that accommodating MacDonald would pose an undue hardship. *Legacy Health*, 174 F.4th at 1206.

CONCLUSION

In light of the foregoing, we affirm the district court's granting of (i) the Individual Defendants' motion to dismiss MacDonald's Free Exercise Claim on qualified immunity grounds and (ii) OHSU's motion for summary judgment on MacDonald's Title VII failure to accommodate claim on undue hardship grounds.

AFFIRMED.

TUNG, Circuit Judge, dissenting:

The discrimination against the plaintiff’s religion here was so obvious that qualified immunity should have been denied. I respectfully dissent.

Board members of Oregon Health and Science University Hospital adopted a policy that purported to offer exemptions to employees who objected to the State’s COVID vaccine mandate on religious grounds. That policy, however, made clear that certain religious beliefs were acceptable while other religious beliefs were not.

What did the policy say? The policy provided for “[r]eligious exceptions” and stated that “[i]n accordance with relevant federal and Oregon law, members who can demonstrate a sincerely held religious belief and past behavior consistent with that belief will be approved for an exception.” 3-ER-551. But the policy then enumerated “[e]xamples of beliefs that do **not** qualify for a religious exception,” including “[a]n objection to the vaccine on the basis of fetal cell concerns, either in the vaccines or in testing and development.” *Id.* (bold and underline in original). The policy explained that “[t]hese professed beliefs are personal moral choices and/or conscientious objections rather than a tenet of a religious faith.” *Id.*

Brittany MacDonald applied for an exemption based on her sincerely held religious belief in the sanctity of human life. In her application, she explained that she believed in “God’s presence with all children, born or unborn, as set forth in Jer[e]miah 1:5[,] ‘Before I formed you in the womb I knew you, before you were born I set you apart[.]’” 3-ER-546. As a result, she could not, in any way, participate in or encourage abortion. Her Christian faith thus requires her “to

refuse the use of medical products, including certain vaccines, that are created using human cell lines derived from abortion during any stage of the vaccine's development, including the testing phase of development of a medical product." 3-ER-543. But members of the Vaccine Exemption Review Committee denied her request because, under the State university's policy, her religious belief was *not* religious at all. 3-ER-549. She was told that her belief was, rather, a mere "personal moral choice[]" and a "conscientious objection[]"—not a "tenet of a religious faith." *Id.* at 549, 551. MacDonald was then fired for refusing to take the vaccine, after which she sued the members of the University hospital board and the review committee who deemed her religious beliefs unworthy of consideration.

It is hard to imagine a more offensive rejection of one's religious faith. To disagree with another person's religious belief is one thing. But to tell a person that her deeply held religious conviction is, really, not religious at all—because it has nothing to do with God or the supernatural—is not only deceptive (a form of gaslighting), it is demeaning. And for State university officials to disrespect (and discredit) a person's religious beliefs in that manner, and to terminate her from her job as a result, runs afoul of the First Amendment. The Defendants' behavior here displays a conceited rejection of a religious belief that the Supreme Court has stridently admonished and found to be unconstitutional. *See Masterpiece Cakeshop, Ltd. v. Colo. C.R. Comm'n*, 584 U.S. 617, 634 (2018).

But even putting that animus aside, the Defendants' "religious exception" policy violated the Free Exercise Clause in another way. "[T]he protections of the Free Exercise Clause pertain if the law at issue discriminates

against some or all religious beliefs or regulates or prohibits conduct because it is undertaken for religious reasons.” *Church of Lukumi Babalu Aye, Inc. v. City of Hialeah*, 508 U.S. 520, 532 (1993). Here, the policy targeted *specific* religious beliefs as not worthy of consideration, while purporting to be open to other bases for an exemption (secular or religious). In particular, the policy singled out an employee’s religious objection to abortion and the use of fetal tissue as categorically undeserving of any consideration. That is a classic case of the State “targeting religious beliefs” and “is never permissible.” *Id.* at 533.

The Defendants cannot contend that they target no “religious belief” since they do not consider that belief (against the use of aborted fetal cells) to be “religious” in the first place. That defense, as discussed, is untenable. We do not take our direction from a State university or its officials as to what is or is not “religious.” Just because State officials say so, does not make it so. The Supreme Court teaches that we must credit what the *adherent* says about her religion—so long as it is sincerely held (a condition that the Defendants do not question). See *Thomas v. Rev. Bd. of Ind. Emp. Sec. Div.*, 450 U.S. 707, 716 (1981); *United States v. Seeger*, 380 U.S. 163, 185 (1965). As the Supreme Court has instructed, too, the Free Exercise Clause forbids “covert suppression of particular religious beliefs,” *Church of Lukumi*, 508 U.S. at 534 (quoting *Bowen v. Roy*, 476 U.S. 693, 703 (1986))—although the policy here was quite overt. We therefore must reject the Orwellian word games played by the Defendants where “religious” means not “religious” but “state approved.”

If the Defendants were right that objection to the use of aborted fetal cells is a mere “personal moral choice” and not “religious,” it could deny religious exemptions to all manner

of adherents in other contexts: the Muslim woman who wears a hijab is exercising a mere sartorial choice, not a religious one, so she must remove it; a Sikh man who keeps a beard has made a grooming decision, not a religious one, so he must cut it; a Seventh-Day Adventist who wants to keep his day of Sabbath free from labor seeks personal relaxation, not religious observance, so he cannot excuse himself from it; and a Catholic doctor who refuses to perform an abortion is exercising a “personal moral choice” and a “conscientious objection,” not a religious objection, so she must perform it. If religious beliefs could be transmogrified in this way, Free Exercise as we know it would be dead.¹

Even on its own terms, the Defendants’ logic folds in on itself. Contrary to the Defendants’ rationale, a “personal moral choice” is not exclusive of a “religious” choice. For many, personal morals are *defined* by one’s religion. Nor does a “conscientious objection” exclude a “religious” objection. For many, personal conscience is *formed* by one’s religion. Religion, morals, and conscience go hand in hand. Only with a mindset steeped in a shallow secularism, so alien

¹ The majority says that the perpetrators of religious discrimination in the hypotheticals would violate clearly established law. Majority at 29–30. I agree. Just as they would violate clearly established law there, the Defendants violate clearly established law here. The majority nevertheless tries to distinguish the hypotheticals from our case, by citing precedent that purportedly “clearly establishes” the prohibition. But not only does that attempt fail, it confirms my point. None of the cited cases addresses a violation of the Free Exercise Clause; all are *statutory* cases. None, therefore, is analogous in the sense the majority would require to deny qualified immunity. Yet the fact that the majority would still deny qualified immunity in the hypotheticals demonstrates the obviousness of the religious discrimination there, which is no different from its obviousness here.

to our founding principles and removed from the values of our people, can one fail to see the connection between a person's religion and her morals.²

The pall of secularism prevents the majority from seeing and thus protecting the plaintiff's obvious First Amendment right here. The majority concludes that qualified immunity must be granted to the Defendants because they faced "novel factual circumstances" and there was "no case, much less a body of case law, that clearly established a healthcare worker's Free Exercise right to an exemption from a state-law mandated vaccine based on religious objections at the height of a global pandemic." Majority at 19, 24. But "Government is not free to disregard the First Amendment

² See, e.g., George Washington, *Farewell Address* (Sept. 19, 1796), in 12 *The Writings of George Washington* 227 (Jared Sparks, ed. 1837) ("[L]et us with caution indulge the supposition, that morality can be maintained without religion."); Letter from John Adams to the Officers of the First Brigade of the Third Division of the Militia of Massachusetts (Oct. 11, 1798), in 9 *The Works of John Adams, Second President of the United States* 228 (Charles Francis Adams, ed., Boston 1854) ("Our constitution was made only for a moral and religious people. It is wholly inadequate to the government of any other."); Alexis de Tocqueville, *Democracy in America* 356 (Henry Reeve trans., Bantam Books 2002) (1835) ("[I]f any hold that the religious spirit which I admire is the very thing most amiss in America, . . . I can only reply that those who hold this language have never been in America, and that they have never seen a religious or a free nation."); Letter from Franklin D. Roosevelt to Samuel I. Rosenman (Dec. 16, 1940), in *The Public Papers and Addresses of Franklin D. Roosevelt* 602–03 (1941) ("Our modern democratic way of life has its deepest roots in our great common religious tradition, which for ages past has taught to civilized mankind the dignity of the human being, his equality before God, and his responsibility in the making of a better and fairer world. . . . For not upon strength nor upon power, but upon the spirit of God shall our democracy be founded." (internal quotation marks omitted)).

in times of crisis.” *Roman Catholic Diocese of Brooklyn v. Cuomo*, 592 U.S. 14, 21 (2020) (Gorsuch, J., concurring). And qualified immunity should not be extended when “a general constitutional rule already identified in the decisional law . . . app[lies] with obvious clarity to the specific conduct in question, even though the very action in question has not previously been held unlawful.” *Hope v. Pelzer*, 536 U.S. 730, 741 (2002) (internal quotation marks omitted) (brackets omitted). “[O]fficials can still be on notice that their conduct violates established law even in novel factual circumstances.” *Id.*

The Defendants’ conduct here plainly violated established law prohibiting the targeting of a person’s religious beliefs. Plaintiff had a right to be free from religious discrimination—in particular, from the State’s targeting of her religious belief (against the use of aborted fetal cells) by deeming such a belief not “religious” at all and thus not worthy of consideration for an exemption. And contrary to the majority’s assertion, Majority at 20, that is true even if the policy purported to give “favorable treatment” to religion; the First Amendment prohibits the State not only from treating religious beliefs less favorably than secular beliefs but also from treating one religious belief less favorably than another. *See Larson v. Valente*, 456 U.S. 228, 231–32, 245–46 (1982) (finding a First Amendment violation when an exemption was extended to some religions but not others). The Defendants violated that right and should have been denied qualified immunity.

Perhaps the strongest argument for extending qualified immunity is the majority’s assertion that no clearly established law compels the conclusion that the State’s policy fails strict scrutiny. Majority at 26. But this argument

fails. Where the Defendants acted with hostility in devising and applying a policy that categorically discredited a person's religious views as not religious at all (*supra* 45–46), such a policy can be “set aside” as clearly unconstitutional without needing to conduct a “further [strict scrutiny] inquiry.” *Kennedy v. Bremerton Sch. Dist.*, 597 U.S. 507, 525 n.1 (2022) (quoting *Masterpiece*, 584 U.S. at 639). Even so, strict scrutiny obviously cannot be satisfied. There is no “compelling interest” in the Defendants’ targeting of certain religious beliefs by deeming those beliefs not religious at all. To be sure, the majority says that the “compelling interest” here is in “[p]rotecting public health and safety.” Majority at 21. But this “objective[]” is stated “at a high level of generality” when “the First Amendment demands a more precise analysis.” *Fulton v. City of Philadelphia*, 593 U.S. 522, 541 (2021). “Rather than rely on ‘broadly formulated interests,’ courts must ‘scrutinize[]’ whether the Defendants have ‘an interest in denying an exception’ to MacDonald on the ground that her belief is not religious at all. *Id.* There is no compelling interest in that.

In any event, the Defendants’ policy is plainly not “narrowly tailored” to advance any asserted interest in public health or safety—the policy suffers from a substantial “underinclusion.” *Church of Lukumi*, 508 U.S. at 531, 543. Certain religious beliefs (*e.g.*, religious objections to the use of fetal cells from aborted babies) are *disqualifying*; whereas other religious beliefs (*e.g.*, a personal revelation to refuse the vaccine from a supernatural being—not “God”—belonging to a polytheistic tradition, or a belief that using modern medicine demonstrates a lack of faith in God as healer) are *qualifying* under the Defendants’ policy. That disparate treatment among religious beliefs—clearly unconstitutional in and of itself, *see Epperson v. Arkansas*,

393 U.S. 97, 104 (1968)—undercuts any claim that the Defendants’ policy survives strict scrutiny.³

The flaw in the majority’s qualified-immunity analysis appears quite evident if we replaced the religious discrimination at issue here with race discrimination. If the Defendants’ policy had prohibited COVID vaccine exemptions for Asian employees but permitted exemptions for other employees, that policy would obviously violate the Equal Protection Clause of our Constitution, and the State officials perpetrating such a policy would be denied qualified immunity. We would not say (as the majority would here) that State officials faced “novel factual circumstances” during “the height of a global pandemic” that would justify qualified immunity for this discrimination. Nor would we say (as the majority would here) that the right not to be denied an exemption on discriminatory grounds in this circumstance lacked clearly established precedent. Instead, we would say that, despite the novelty of the factual situation, the Defendants had clear notice that it would be unlawful to deny an exemption on the basis of race.

The same logic applies with equal force here: as with a racially discriminatory exemption policy, it is obviously unlawful to deny an exemption on religiously discriminatory grounds, and it is religious discrimination to discredit

³ The majority raises an additional argument that is more easily dealt with. The denial of MacDonald’s request for a religious exemption, the majority states, was accompanied by statements meant to “combat[] misinformation” about the use of fetal tissue in vaccines. Majority at 19. But that does nothing to refute the point that MacDonald’s belief was religious (however “misinform[ed]” the Defendants perceived that belief to be) and that the Defendants refused to credit the belief’s religiosity in denying her request.

categorically a particular set of religious beliefs as beneath the State's consideration. The majority's attempt to resist this straightforward parallel fails. The majority says, citing *Yick Wo v. Hopkins*, 118 U.S. 356 (1886), that a racially discriminatory exemption policy would violate "clearly established" law. Majority at 30–31. But how *Masterpiece* and *Church of Lukumi* are any less "clearly established" in prohibiting religious discrimination than *Yick Wo* is in prohibiting racial discrimination is a total mystery to me. They are not. While neither set of cases addresses vaccine exemptions, they establish clear rules (don't discriminate on the basis of religion; don't discriminate on the basis of race), the violation of which would be so obvious in our case and in our hypothetical as to result in the denial of qualified immunity to the perpetrators. The bottom line of all this is clear: religious discrimination should not be tolerated any more than racial discrimination. Yet the majority forgets that truism. By our Founders' constitutional design, the Free Exercise Clause was meant to stand as our shield in the strife. Too bad the court removes it here.

I respectfully dissent.*

*I would affirm the district court's denial of plaintiff's Title VII claims. Plaintiff waived her Title VII religious-discrimination claim when she withdrew her motion to amend the complaint to add such a claim. SER-93, 119. And on appeal, with respect to her Title VII religious-accommodation claim, Plaintiff does not challenge the district court's undue hardship analysis.